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July 21, 2014

VIA EMAIL & COURIER

Jeff S. Jordan, Esquire
Supervisory Attorney
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6817 – Dr. Monica Wehby, Dr. Monica Wehby for U.S. Senate, and Bryan Burch, as Treasurer

Dear Mr. Jordan:

Please find attached the response of our clients, Dr. Monica Wehby, Dr. Monica Wehby for U.S. Senate, and Bryan Burch, as Treasurer, to the notification from the Federal Election Commission that a complaint was filed against them in the above-referenced matter.

Please do not hesitate to contact us with any questions.

Respectfully Submitted,

William J. McGinley
Ann M. Donaldson

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of	)	
	)	
Dr. Monica Wehby, Dr. Monica Wehby for U.S. Senate, Bryan Burch, as Treasurer	)	**MUR 6817**
	)	

RESPONSE OF DR. MONICA WEHBY AND DR. MONICA WEHBY FOR U.S. SENATE TO THE COMPLAINT AND SUPPLEMENTAL COMPLAINT

Dr. Monica Wehby, Dr. Monica Wehby for U.S. Senate and Bryan Burch, as Treasurer (collectively "Wehby Respondents"), through counsel, hereby respond to the notification from the Federal Election Commission ("Commission") that a complaint and supplemental complaint (collectively the "complaint") was filed against them in the above-captioned matter. The complaint, filed by the Oregon Democratic state party chairman, is a political publicity stunt that contains spurious allegations based on conjecture in an effort to generate headlines. For the reasons set forth below, the complaint is without merit and is legally deficient because it fails to allege a violation of the Federal Election Campaign Act of 1971, as amended (the "Act") or Commission regulations. The Wehby Respondents generally and specifically deny the complainant's allegations, and we respectfully request that the Commission dismiss the complaint and close the file.

The focus of the complaint is almost entirely on the activities of an independent expenditure-only political committee, commonly called a "Super PAC," and not on any specific actions of the Wehby Respondents. And to the extent the complaint takes issue with the Wehby Respondents, it only does so in speculative, condescending terms, claiming "coordination" due

to a supposed romantic relationship between the candidate and a donor to the Super PAC.[1] Predictably the Oregon Democratic Party orchestrated a media onslaught targeting Dr. Wehby's election efforts.

Ignored by the Oregon Democrats is what the Commission has already said regarding the speculative accusations contained in the complaint. The Commission has already made abundantly clear – time and time again, in a variety of contexts – that a familial or similar relationship is not evidence of coordination. In fact, as the Office of General Counsel observed in a similar matter, "[t]his is too thin a reed." MUR 6611 (Ruderman), First General Counsel's Report at 9. Similarly, "[t]he Commission's coordination regulations do not require heightened scrutiny to situations involving familial ties or other personal relationships . . . ." MUR 6277 (Kirkland), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 5, n. 14 (controlling opinion). Here, complainant's speculation is insufficient, as "mere 'official curiosity' will not suffice as the basis for FEC investigations . . ." *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Accordingly, there is no factual or legal basis for the Commission to find reason to believe in this matter, and the Commission must dismiss the complaint and close the file against the Wehby Respondents.

ANALYSIS

1. The Complaint's Speculation Regarding "Coordination" Is Unsupported by Factual Evidence

[1] Indeed, we are disappointed that the Oregon Democratic Party chairman would seek to mask stereotypical allegations against an accomplished professional in this manner. Even a cursory review of the complaint and supplemental complaint reveals the use of value-laden terms that have no other apparent purpose than to belittle a professional as a means to make a public issue out of a private relationship.

The theory advanced by the Democratic complainant is as simple as it is wrong: According to the complaint, coordination can be established simply because of some sort of supposedly romantic relationship between the candidate and a contributor to a Super PAC. Both the Commission and the Office of General Counsel ("OGC") have already said otherwise, and such past action warrants dismissal now.

For example, in MUR 6611 (Ruderman), OGC recommended that the Commission find no reason to believe that a violation occurred regarding allegations similar to those here. In that MUR, an independent expenditure-only political committee was funded almost exclusively by a candidate's mother, and that candidate's mother appeared in a campaign advertisement. From these scant facts, the complainant declared that the candidate's mother "obviously possessed material information regarding the campaign's plans and strategy, and used the information in determining the direction and content of her attack ads." First General Counsel Report at 2, MUR 6611 (Ruderman). OGC recommended that the Commission find no reason to believe that illegal coordination occurred.

The same conclusion ought to follow here. Like in MUR 6611, the Oregon Democratic Party points to a relationship between the candidate and a financial supporter of a Super PAC. Also like in MUR 6611, the complainant points to some campaign involvement by the Super PAC contributor – the involvement here, however, is even more minimal than that alleged in MUR 6611. There, the mother of the candidate actually appeared in a campaign advertisement, whereas here the Super PAC funder merely was one of numerous hosts for a campaign fundraiser. Given the similar allegations – and that the current matter is an even easier case than

that presented in MUR 6611 – the result ought to be the same.[2] Especially in the present matter where the complainant cites no evidence and presents no facts to support his deceptive allegations. Rather, complainant can only speculate making statements such as "[t]his suggests" and noodling around his awkward theories. Thus, OGC ought to recommend a finding of no reason to believe, which the Commission in turn ought to adopt.

In addition, in MUR 6277 (Kirkland) the Commission dismissed a complaint containing similar allegations. In that matter, a candidate's brother was accused of illegal coordination. Even though the facts in MUR 6277 presented a closer call than those in MUR 6611, the ultimate result was the same, and the matter was dismissed. As the controlling group of Commissioners explained:

> Nor can [the FEC] find reason to believe coordination occurred merely because [the respondent] is the candidate's brother. Indeed, the Commission has made clear in related contexts that a mere family relationship is not enough to establish an agency relationship or otherwise support an inference of coordination.

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[2] That the Commission split 3-3 on OGC's recommendation in MUR 6611 is of no consequence. First, merely because three commissioners thought an investigation was warranted ought not change OGC's independent view of the correct result. Second, the D.C. Circuit has already held that the three commissioners who decline to pursue a matter constitute the controlling bloc for purposes of review. *Democratic Senatorial Campaign Committee v. FEC*, 139 F.3d 951 (D.C. Cir. 1998). Thus, a finding of no reason to believe is the controlling view in MUR 6611.

Moreover, given that OGC recommended no reason to believe in MUR 6611, which was supported by a controlling group of commissioners, both the Administrative Procedures Act and fundamental due process preclude a different result here. *See* MUR 5564 (Alaska Democratic Party), Statement of Reasons of Commissioners David M. Mason and Hans A. von Spakovsky at 2-3 & 10 (when the Commission has not proceeded against a certain type of respondent previously, it should not proceed against similarly situated respondents in the future unless the public has notice through a rulemaking); *CBS v. FCC*, 535 F.3d 167 (3d Cir. 2008) (an agency cannot, in an enforcement action, take a substantial deviation from prior enforcement policies without sufficient notice of change in policy); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-2316 (2012) ("In the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and 'show that there are good reasons for its new policy.'" (quoting *FCC v. Fox Television Stations*, 556 U.S. 502 at 515 (2009))).

MUR 6277 (Kirkland), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 10.

MUR 6277 also answers the Oregon Democrats' conclusory allegation that the Super PAC contributor was an "agent" of the Wehby campaign. As the controlling opinion in MUR 6277 stated, "such a strained view of agency runs counter to the Commission's regulatory definition of the term." *Id.* at 9. Commission regulations make clear that "agency" requires actual authority, and not the sort of apparent authority alluded to by complainant and specifically rejected by the Commission during the relevant rulemaking. *See* 11 C.F.R. 109.3(b) (requiring actual authority). As was the case in MUR 6277, the complainant cites to no evidence to support his deceptive assertion that the Super PAC contributor had any sort of actual authority, either express or implied, to act on behalf of the campaign. *See* Advisory Opinion ("AO") 2003-10 (Rory and Harry Reid) (holding that son of U.S. Senator and candidate was not his "agent": "the Commission concludes that Commissioner Reid is not an 'agent' of Senator Reid solely because they are father and son."); AO 2007-05 (Iverson) (official chief of staff for Congressman was not an "agent" of the Congressman, and was permitted to serve as state party chairman).

Ultimately, the Oregon Democratic Party offers nothing but speculation in support of their politically motivated coordination accusations. Their failure to offer any support for their deceptive allegations leaves only one result: that there is no reason to believe that a violation occurred.

2. Such Speculation Fails to Establish Reason to Believe

The Commission has already made clear that simple speculation by a complainant is insufficient, and that when a complaint fails to carry its burden and does not establish that there is reason to believe that a violation of the Act has occurred, the matter must be dismissed.

Similarly, the Commission has held that the burden does not shift to a respondent in an enforcement action merely because a complaint has been filed and accusations made, especially such as here where the complaint fails to allege facts that constitute a violation under the Act and Commission regulations. *See* MUR 4850 (Deloitte & Touche, LLP, *et al.*), Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2 ("The burden of proof does not shift to a respondent merely because a complaint is filed.").

Moreover, a reason to believe finding is warranted only if a complaint sets forth specific credible facts, which if true, would constitute a violation of the Act. *See* MUR 6554 (Friends of Weiner), Factual & Legal Analysis at 5 ("The Complaint and other available information in the record do not provide information sufficient to establish [a violation]."). Here, the Oregon Democratic Party has failed to allege such specific credible facts. Critically, the Commission has already made clear that unwarranted legal conclusions from asserted facts, or mere speculation will not be accepted as true, and cannot support a finding of reason to believe. *See* MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts will not be accepted as true." (internal citation omitted)); MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom and Scott E. Thomas at 2 (complaint failed to alleged violation of the Act).

Nor is a respondent obligated to deny that which is not alleged, or is alleged in conclusory fashion, as the Oregon Democrats have done here. *See* MUR 4850 (Fossella), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and

Scott E. Thomas at 2 (rejecting the Office of General Counsel's recommendation to find reason to believe because the respondent did not specifically deny conclusory allegations, holding that "[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to respondents."); MUR 5467 (Michael Moore) First General Counsel Report at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of [the Act] has occurred." (quoting MUR 4960, Statement of Reasons of Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas)).

A lack of information, or inadequate information, does not support a finding of reason to believe, and cuts against the complaint. MUR 4545 (Clinton/Gore '96 Primary Committee, Inc.), First General Counsel Report at 17 (since "the available evidence is inadequate to determine whether the costs . . . were properly paid, the complaint's allegations are not sufficient to support a finding of reason to believe . . . ."). That the Oregon Democrats have failed to offer any factual support is not the concern of the Wehby Respondents; on the contrary, it mandates dismissal. *See generally* MUR 5878 (Arizona State Democratic State Central Committee), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (discussing reason to believe standard).

These precedents apply with particular force here, where a political opponent is seeking to use the enforcement process to attack an opposing candidate, and speculate about her personal life and relationships, by asserting the same legal theories that have already been rejected by the Commission during rulemaking, advisory opinions and enforcement matters. Simply put, the complainant's speculation is unavailing, and based upon a legion of past Commission precedent,

woefully inadequate to establish reason to believe that a violation occurred. In the words of OGC, "[t]his is too thin a reed." MUR 6611 (Ruderman), First General Counsel's Report at 9.

CONCLUSION

For the reasons stated above, the complaint is without merit and there is no factual or legal basis for a reason to believe finding in this matter. Accordingly, we respectfully request that the Commission dismiss the complaint, close the file, and take no further action.

Respectfully submitted,

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